SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1205~~ 75

FRANK LEE, as Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, as Warden of the City Jail of Birmingham, Alabama,
*Appellants*

v.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR., *Appellees*

**On Appeal From the United States District Court for the Middle District of Alabama, Northern Division, Sitting as a Three-Judge District Court**

## MOTION TO AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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No. 1208

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*Appellants*

v.

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## MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

## STATEMENT

This is a direct appeal from the final judgment and decree entered on December 12, 1966, by the U.S. District Court for the Middle District of Alabama, specially constituted as a three-judge court pursuant to 28 U.S.C. § 2281, declaring unconstitutional §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, recompiled 1958, and ordering the desegregation of state penal facilities, county and municipal jails.

Appellees instituted this suit as a class action on February 18, 1966, alleging that provisions of Alabama law requiring the separation, classification or designation of prisoners on the basis of race were facially unconstitutional and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment of the Constitution of the United States.

The final order of the U.S. District Court for the Middle District of Alabama, Northern Division, rendered December 12, 1966, reported at 263 F. Supp. 327 (1966), is set out in full in the Appendix to Appellants' Jurisdictional Statement and is incorporated herein by reference thereto. The District Court declared §§ 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, recompiled 1958, to be in violation of the Fourteenth Amendment of the Constitution of the United States to the extent that they require segregation of the races in the prisons and jails of Alabama. The District Court ordered the total desegregation of all state penal facilities, including the maximum security institutions, within a period of one year, and as to the county and city jail systems a completed de-

segregation within six months, in all areas, including quarters. Very exceptional instances such as, for example, the use of the "drunk tank," were excluded from the order. The appellant Frank Lee (a defendant below), as Commissioner of the Board of Corrections for the State of Alabama, was ordered to take the necessary and appropriate steps to desegregate immediately the several honor farms, the educational programs, the youth centers and the hospitals in the state penal system. To effect the complete desegregation of the minimum and medium security institutions, as operated by the state penal system, six months were provided. The defendants were also ordered to take the necessary and appropriate steps to effect complete desegregation of all other state penal facilities, including the maximum security institutions, within a period of one year. Appellant Robert K. Austin (a defendant below) and each warden in each town and city in the State of Alabama were ordered to take the necessary and appropriate steps to completely desegregate the town and city jails, and any other penal facilities and operations that are maintained by any such town or city, within a period of six months. The appellant Lee as the Commissioner of the Board of Corrections for the State of Alabama was ordered to supervise the racial desegregation of every county and municipal jail or prison in the State of Alabama and report to the Court every three months concerning the steps being taken and the progress being made in state penal institutions and county and city jails and other penal facilities.

Notice of Appeal was filed by defendant Frank Lee as Commissioner of the Board of Corrections of Alabama and the defendant Members of the Board of Corrections of Alabama, on February 6, 1967.

Notice of Appeal was filed by Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama, on February 8, 1967.

Defendant A. Melvin Bailey, sued as Sheriff of Jefferson County, Alabama, and as representative of the State's other sheriffs, filed no appeal.

## ARGUMENT

The decision of the District Court is plainly correct. A state cannot constitutionally require the racial segregation of public facilities. See, e.g., *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Johnson* v. *Virginia,* 373 U.S. 61 (1963); *Cooper* v. *Pate,* 378 U.S. 546 (1965); and *Singleton* v. *Board of Commissioners,* 356 F. 2d 771, 772 (1966). In *Singleton, supra,* the United States Court of Appeals for the 5th Circuit extended the principle of *Brown* v. *Board of Education, supra,* to include penal or correctional facilities. See also *Edwards* v. *Sard,* 250 F. Supp. 977 (D. C. 1966).

That the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States follow appellees into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law is too settled for argument. *Cooper* v. *Pate,* 378 U.S. 546 (1965); *Cochran* v. *Kansas,* 316 U.S. 255 (1942); *Sewell* v. *Pegelow,* 291 F. 2d 196 (4th Cir. 1961); *Pierce* v. *LaVallee,* 293 F. 2d 233 (2d Cir. 1961), and *Fulwood* v. *Clemmer,* 295 F. 2d 171 (D.C. Cir. 1961).

Appellants claim that racial violence will result from integration. It is well settled that the threat of racial

violence cannot justify the denial of constitutional rights. *Cooper* v. *Aaron,* 348 U.S. 1 (1958).

Appellants insist that the District Court has usurped "prison management" and the "supervisory authority" of prison officials. In the matter of racial segregation, prison officials have had no "authority" whatsoever. Alabama's statutes themselves eliminated all discretion.

Appellants claim that appellees lack proper standing to sue. Appellees have standing on the basis of the decisions in *Mitchell* v. *U. S.,* 313 U.S. 80 (1941); *Henderson* v. *U. S.,* 339 U.S. 816 (1950); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Singleton* v. *Board of Commissioners, supra;* and *Ferguson* v. *Buchanan,* No. 64-107-CIV-CF, So. Dist. Fla., March 12, 1965.

Appellant Austin fulfills the requirements of Rule 23 of the Federal Rules of Civil Procedure. The questions of law and fact are common as to him and the members of the class he represents. The locations and the physical facilities of the jails in question, without more, are basically irrelevant to a determination of the applicable law. *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F. 2d 909 (9th Cir. 1964). See also *Potts* v. *Flax,* 313 F. 2d 284 (5th Cir. 1963); and *Sims* v. *Frink,* 208 F. Supp. 431 (M. D. Ala. 1962) aff'd *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

We respectfully submit, therefore, that the appellants present no substantial question for the decision

of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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